Supreme Court, U. S.
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MICHAEL RODAK, JR., CL

No. 80-179

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1980

JAMES N. AUTRY, et al.,
Petitioner,

vs.

BARBARO FLORES and ALMA FLORES,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Respondents, Barbaro and Alma Flores, respectfully pray that the Petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on May 7, 1980, be denied and that this Honorable Court order Petitioners to pay damages to Respondents.

QUESTIONS PRESENTED

1. Did Respondents suffer a deprivation of a constitutional right cognizable under 42 USC, Section 1983?

2. Are the Petitioners entitled to a qualified immunity instruction when said officials prevented issuance of a beer license to Respondents by filing official protests motivated by a purpose to discriminate on the basis of race or national origin?

3. Should the Supreme Court deviate from its policy not to consider issues which have not been presented to the Courts below?

PARTIES INVOLVED

The parties on whose behalf this Response is filed are Alma and Barbaro Flores, private citizens, of Mexican descent.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATEMENT OF THE CASE

The Respondents, Plaintiffs below, are Barbaro and Alma Flores, husband and wife, both of whom are of Mexican origin. The Floreses were proprietors of a beer bar in Yountville, California, called the Mexicali Rose. The Floreses, by the name of the bar and its ambience, including the music, the decorations, and the brands of beer served, primarily served a Mexican-American clientele.

In July, 1974, the Floreses decided to open a restaurant in Calistoga, a city of 2,200 people, located about twenty

miles from Yountville. They leased the premises and made arrangements to open a Mexican food restaurant called The Palacio, anticipating that the clientele there also would be comprised in large part of Mexican-Americans.

In August, 1974, the Floreses applied for a type 41 license from the Department of Alcoholic Beverage Control of the State of California (ABC), a license which would permit them to serve beer and wine with food served in the restaurant.

Upon learning of the Flores license application, the Calistoga police chief, Petitioner Autry, filed a protest with the ABC. Autry and several Calistoga townspeople also brought the Flores application to the attention of Calistoga Mayor Butler and city council members Holtzen, Hively, Thom and Smith, Petitioners herein. Acting in their official capacities, Mayor Butler and the city council, protested the Flores application on September 3, 1974. About three months later, like protests were also lodged against the application of one Grusdiv, who applied for a beer license for a pool hall. The Grusdiv clientele consisted almost entirely of Mexican-Americans. The stated reasons for opposing the Flores and Grusdiv applications was that the issuance of the licenses would lead to an undue concentration of liquor licenses and would aggravate an existing police problem.

Under California law, a protest by a public official operates to block issuance of the license and a license cannot

be issued until a public hearing is held, if at all.[1] The ABC denied both applications. As a result, when the Floreses opened their restaurant on February 6, 1975, they could not serve beer or wine with the food. The Floreses appealed the denial of the license at an administrative hearing and then to the Alcoholic Beverage Control Appeals Board. ABC had at all times conceded that the Floreses had the requisite good moral character to obtain a license. The Appeals Board reversed the ABC, and the Flores license was finally granted on September 22, 1975.

In the Spring of 1974, before the Flores application, ABC applications were filed by two non Mexican establishments in Calistoga. Petitioners received notice of these applications and no protest was made to the ABC. In late November, 1974, Grusdiv filed an application for a type 40 license (beer only) and a non Mexican husband and wife by the name of Browne applied for a type 41 beer and wine license (like the Floreses'). At trial, Grusdiv field that his clientele was primarily Mexican-American field workers (98%). The Browne establishment did not cater to this type of clientele. The first city council meeting after these applications were posted, was on December 17, 1974. Prior to the council meeting, Petitioner Autry had a conversation with representatives from the ABC and was advised that although the Browne application was for a

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[1]Petitioners, in their STATEMENT OF THE CASE, page 2, state "A protest by a public entity, however, makes a hearing required whether or not the application is denied. California Business and Professions Code Section 23988." Section 23988 was *repealed* in 1971. California Statutes and Amendments to the Code 1971, Chapter 1444, p. 2653, Section 1. Section 24013, is the law that pertains to the case at bar.

new license, that it could be treated as a "transfer", and hence, differentiate it from the Grusdiv application.[2] At the city council meeting of December 17, the city council voted to oppose the Grusdiv application on the ground that it would "lead to an undue concentration of liquor licenses". No mention was made of the Browne application, nor was the Browne application opposed by any of the Petitioners. After opposing the Grusdiv application, Petitioners passed a motion that Petitioners Autry and the City Clerk were to bring all new applications for liquor licenses before the council so that the council could make a decision regarding the "desirability of the applicants".

In January, 1975, ABC issued to the Brownes the new type 41 license and denied to Grusdiv his application for the type 40 beer license. The Flores application was denied on December 26, 1974.

On September 3, 1974, and on December 17, 1974, when Petitioners voted to oppose the Flores and Grusdiv applications, there was no information available to the city council members regarding any police problems associated with premises that were licensed to sell alcoholic beverages in Calistoga. Statistics regarding the number of calls, arrests, and other data regarding Calistoga Police activities were not compiled, and were not available, until late January, 1975. These statistics were gathered for the purpose of supporting the City's position that the issuance of another

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[2]Petitioner Autry was specifically informed by the ABC that he could not, "pick and choose" the applications he would protest and that to do so would be to discriminate. Despite this warning, the petitioners continued the policy of selective protest affecting the Mexican-American establishments in question.

license would result in an undue concentration and would "aggravate an existing police problem".

Petitioners admitted, and ABC confirmed, that except for one incident in 1972 or 1973, neither the City of Calistoga, nor its police chief, had ever lodged a complaint with the ABC regarding problems, police or otherwise, caused by licensed premises within the City of Calistoga. Petitioner Hively was an official of Calistoga since 1947, and Petitioner Autry had been a member of the police department since 1952. Both Petitioners testified that the City of Calistoga had never opposed an application for the sale of alcoholic beverages, until the time of the Flores opposition in September, and the Grusdiv opposition in December, of 1974.

All Petitioners testified that their reason for voting to oppose the issuance of the beer license to Respondents, was based upon the recommendation of Petitioner Police Chief Autry or their own independent conversations with Napa County deputy sheriffs, or townspeople. The uncontradicted testimony of all Petitioners is that on the date that the city council voted to oppose the Flores application, only Petitioner Autry spoke on the issue of the Flores application. None of the Petitioners testified that any information or opinions were sought, or received, from City Attorney David York.[3] Mr. York did not testify at the trial.

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[3]Petitioners allege in their Petition, page 8, first and second paragraphs, that their actions were based, at least in part, upon the advice of their attorney, David York. No such evidence was ever testified to at the trial of this matter. The only testimony regarding City Attorney David York, was that he was present during the

None of the information regarding the Flores beer bar in Yountville, the alleged stabbing, serving minors, shooting, letters of reprimand, etc., was known to any of the Calistoga Petitioners prior to September 3, 1974. The letters of reprimand were not sent to the Floreses until the latter part of September, 1974, and were not made available to any of the Calistoga Petitioners until February or March, 1975.

Every police report, and every ABC report, regarding the Flores beer bar in Yountville, made reference that the individuals involved were of Mexican "Race"; and a description of the activities which precipitated problems had been aggravated "by the large number of Mexican field workers in the area to harvest the grapes", or "these Mexicans always sashay slowly across the street making me stop my car to let them by", or similar comments.

Petitioners Autry, Butler and Holtzen, all testified that they had discussed the Flores application with law enforcement officers or townspeople (Petitioners testified that they had been approached by 15 to 30 townspeople). Petitioner Autry testified that he had seen police reports and ABC reports prior to his letter of opposition and prior to his recommendation at the city council meeting of September 3, 1974. Petitioners all testified that at no time during the

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meeting of September 3, 1974, and that he was subsequently requested to compose the opposition letters which were resubmitted to the ABC on October 8, and October 16, 1974 (the September 3, 1974, letter from Petitioner Butler and the August 22, 1974, letter from Petitioner Autry were both found to be deficient by the ABC and request was made that the opposition letters be resubmitted setting forth the appropriate legal ground upon which their objection could be sustained). Mr. York did not testify at the trial.

conversations with the sheriff's officers, or the townspeople, was the ethnic background of the Floreses or their clientele, ever mentioned or brought up.

On December 17, 1974, Calistoga established a policy that all new applications for ABC licenses would be brought to the city council, so that they could determine the "desirability of the applicant". Petitioners testified that the reason they wanted to investigate the "desirability of the applicant", was because Calistoga was a "fine little town" that needed to be kept "on an even level"; and that they wanted to be sure that the business people who came into Calistoga would run the type of business that is compatible with "the way a business ought to be run".

Prior to the Floreses occupying the Calistoga premises, said premises had housed a general on-sale bar (liquor, wine and beer sold) from 1939, until 1973. The City of Calistoga, nor any of its officials, had ever objected, or complained, about the existence of this license at this location.

For more than 25 years prior to the Flores application, the City of Calistoga had always had a population of approximately 2,200 residents and there had always been 17 or 18 ABC licensed premises of various types. During all the years that the various licenses existed, within approximately two blocks of each other, the issue of there being too many licenses, or "an undue concentration of licenses", had never been raised, until the Floreses made application. Within three months of the Flores application, the Grusdiv application was also opposed, but not the Browne applica-

tion, which had been filed two days previous to Grusdiv,[4] nor the two applications filed by non-Mexicans, two months before the Flores application.

The ABC District Administrator testified that there was an unwritten ABC policy to sustain a public official's protest if there was any color of merit to it, at least in the first instance. The ABC District Administrator further testified that if the Calistoga officials had not protested, he would have recommended the issuance of the license to the Floreses, because they were of good moral character, had never had an accusation brought against them regarding their license in Yountville, and further, they met all other ABC requirements. The ABC investigator, Scurachio, testified accordingly.

Petitioners knew, that as a matter of policy, the ABC would sustain their objection after conducting a "lengthy investigation". The ABC's "independent investigation" is found as Appendix A to this Response.[5] With the exception of the personnel makeup of the Police Department and a

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[4]In 1976, Grusdiv filed suit in the United States District Court for the Northern District of California, seeking damages under 42 U.S.C. Section 1983, against the Calistoga defendants, and Petitioners herein. The Grusdiv suit was settled after the Flores verdict and within days before it was set to go to trial.

[5]Petitioners' Appendix C is a misstatement of the evidence. Petitioners describe their Appendix C as the decision of the administrative hearing officer. Petitioners' Appendix C is in actuality the Scurachio investigation report (Respondents' Appendix A) and supplemental material that was prepared by the ABC District Administrator in 1975, in preparation for the administrative hearing on the Flores application, which hearing took place in March, 1975. The supplemental material submitted by the District Administrator is found in Petitioners' Appendix C, pages A-22 to A-26.

map of Calistoga, all the information contained in the "investigation" report was information obtained from the ABC's own records in their district office.

The Floreses brought suit for damages under 42 U.S.C. Section 1983 against the Calistoga officials, Petitioners herein.[6] The Floreses claimed that their right under the equal protection clause to be free of State action, which purposely discriminates on the basis of race or national origin, had been violated by Petitioners, acting under color of law. The case was tried by a jury which returned a general verdict for the Floreses in the amount of $48,500.

With the exception of information contained in numbers 1, 2, 3 and 4 of Petitioners' Appendix C, page A-23, none of the information contained in the supplemental material was known to any of the Calistoga defendants prior to September 3, 1974.

[6]Certain officials of the ABC were also named as defendants in the suit. A verdict in favor of the ABC officials was returned.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I

ACTION BY PUBLIC OFFICIALS WHICH PLACES DISCRIMINATORY BURDEN UPON RACIAL MINORITIES THAT IT DOES NOT PLACE UPON OTHER CITIZENS IS A DEPRIVATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION

Respondents applied to the ABC for a beer license in August of 1974. The ABC has exclusive authority and jurisdiction within the State of California to investigate, grant or deny alcoholic beverage licenses.[7] The power to grant or deny applications for licenses, is a discretionary one with the ABC. However, the ABC looses this discretion when a protest is made by a public agency, a public official or a governing body of a city or county, such as a protest filed by Petitioners herein. A protest filed by a public official operates to block the issuance of the license[8] (Appendix B) and a license cannot be issued until a public hearing is held, if at all.

By filing the protest to the Flores application, Petitioners herein removed discretion from the ABC to issue the license to the Floreses and forced them to pursue a more vigorous, expensive and time consuming administrative procedure, in order to secure the license they were seeking. Petitioners filed their protest pursuant to existing

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[7]California Constitution, ARTICLE XX Section 22; California Business and Professions Code Section 23000.

[8]California Business and Professions Code Section 24013.

law in the State of California, but they did so with the intent, and the obvious purpose of keeping the Floreses and their clientele out of Calistoga.

No matter how neutral an official action appears on its face, if practically such action is to place a burden on one national origin or racial group that it does not place on all of the citizens, then such burden constitutes a denial of the equal protection of the laws. *Hunter v. Erickson,* 393 U.S. 385, 89 S.Ct. 557 (1969).

During the seven month period between May to December, 1974, Petitioners only protested two of the five ABC license applications in the City of Calistoga. The two applications protested were Respondents' and Grusdiv, whose clientele was almost exclusively Mexican-American. The other three applications were made by the White majority group members, were not protested and were granted within two blocks of the protested applications. It was clearly established that the protests were intended to and did cause the ABC to deny issuance of the Respondents' license. Respondents were able to prove that the protests were discriminatorily motivated, establishing a violation of the equal protection of the laws.

Petitioners attempted to apply a statute fair on its face in a manner to produce unequal treatment and to discriminate on the basis of national origin and racial groupings. There can be no question that had Petitioners been successful in their affirmative actions, that they in effect, would have transferred the power to issue liquor licenses to themselves in the obvious disadvantage of the national origin and racial minorities. There can be no compelling public

interest which allows Petitioners to deny any national origin or racial person the right to proceed unburdened in the quest of a beer license, while at the same time allowing the rest of the citizenry to proceed in an unburdened manner. The attempt to exclude Mexican Americans from obtaining a beer license in the City of Calistoga is no less invidious than an attempt to keep Mexican Americans or other racial minorities from residing in the City of Calistoga.

II

ARE PETITIONERS ENTITLED TO A GOOD FAITH INSTRUCTION WHEN, BY THEIR OFFICIAL ACTS, THEY PREVENTED THE ISSUANCE OF A BEER LICENSE TO RESPONDENTS BY FILING PROTESTS MOTIVATED BY A PURPOSE TO DISCRIMINATE ON THE BASIS OF RACE OR NATIONAL ORIGIN?

Petitioners seem to maintain, and wish this Honorable Court to concur, that once they have affirmatively pleaded, in their Answer, a qualified good faith immunity, that said pleading entitles them to a jury instruction on good faith immunity. Further, Petitioners imply that said good faith immunity instruction must be the instruction that they submit and not an instruction composed and given by the trial court. Petitioners state "The trial court refused to give the (*Petitioners'*) instruction or any other instructions presenting the (*good faith*) issue to the jury".[9] Petitioners, once again, misstate what occurred at the trial court. After considerable discussions with attorneys for Petitioners and Respondents, the trial court *did* give a good faith instruction (Appendix C). Respondents argued against the

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[9]Petitioner's Petition, p. 7, first paragraph, first sentence.

giving of any good faith instruction, based upon the ground that Petitioners imposed a discriminatory burden on Respondents, based on Respondents' race or national origin, or that of their clientele, and therefore, could not shield themselves from liability with any good faith immunity. Petitioners wanted their good faith instructions as drafted, given. The trial court essentially agreed with the arguments of both counsel by drafting and giving its own instruction, as follows:

> *Good Faith*
>
> During trial, evidence has been received concerning the policies, practices, and procedures of the California Department of Alcoholic Beverage Control, and you have been instructed concerning various aspects of California Law.
>
> If you find that any of the defendants acted in reasonable good faith reliance on those procedures or laws with a reasonable good faith belief that their actions did not violate plaintiffs' constitutional rights, you should return a verdict in favor of that defendant. This belief must be reasonable in light of the circumstances at the time of the action. However, if any defendant acted on the basis of a purpose, motive or intent to discriminate against the plaintiffs because they are of Mexican descent, or if any defendant knew or reasonably should have known that the actions he took violated plaintiffs' rights to the equal protection of the laws as defined in these instructions, then the defendant's actions cannot be considered to be taken in good faith and you should return a verdict in favor of the plaintiffs and against the defendant.
>
> *Wood v. Strickland*, 420 U.S. 308 (1975);
> *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Comparing of the instruction requested by Petitioners, and the instruction given by the trial court below, the conclusion reached is that Petitioners are not complaining about the lack of instructions on good faith, but rather, they are complaining that the trial court did not give a good faith instruction *exactly* as Petitioners presented it in its written form. The instruction which Petitioners would have the court give to the jury would legitimize the practice of racial discrimination by public officials. Such an instruction allows a jury to determine that there has been racial discrimination, and then allows the jury to grant immunity to public officials because there was a mistake made, in good faith, in their racial discrimination.

This court has never held that once the defense of qualified immunity is pleaded, that it automatically becomes a defense. This court has held that a public official who might be entitled to a defense of qualified immunity has the burden of pleading it. The defense of qualified immunity can only be available when there has been considered inquiry into the historical development of the immunity and the intentions behind it. *Gomez v. Toledo,* ..... U.S. .....; 100 S. Ct. 1920 (1980); *Imbler v. Pachtman,* 424 U.S. 409. Petitioners have presented no considered inquiry in this Court or the Courts below, and have not presented any public policy reasons to believe that public officials should be allowed to discriminate on the basis of race or national origin, without questioning their intentions. On the contrary, strong public policy, enunciated by this Court, is to ensure that there will be no discrimination on the basis of race or national origin.

Allowing public officials to selectively apply statutes in such a manner to invidiously discriminate on the basis of national origin and/or race, and then claim mistake made in good faith, is contrary to the central purpose of the Equal Protection Clause of the Fourteenth Amendment, which is the prevention of national origin and/or racial discrimination by public officials. *Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040 (1976); *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064 (1886).

This Court has repeatedly held that a qualified immunity under 42 U.S.C. Section 1983 may be available to defendants when the immunity was well established at common law at the time Section 1983 enacted, and when the immunities rationale was compatible with the purposes of the Civil Rights Act. *Owen v. City of Independence, Mo.,* ..... U.S. .....; 100 S.Ct. 1398 (1980); *Gomez,* supra. Whether qualified immunity is available to the Defendants in a cause of action depends upon the circumstances and motivations of their action as established by the evidence during the trial. *Imbler,* supra.

Assuming, but not conceding, for the purpose of discussion that an immunity existed for public officials to discriminate on the basis of national origin or race, at the time that Section 1983 was adopted, it must be conceded by all, that such a policy is not compatible to the purposes of Section 1983. The record below is completely void of any matter, factual and legal, which would sustain both the existence and the compatibility which is required by this court to establish any qualified immunity.

This court has made it abundantly clear that official action having the effect of discriminating between national origin and racial groups on one hand, and the majority White group on the other hand, is so constitutionally suspect that public officials must come forward with a compelling interest to justify such discrimination. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693 (1954); *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283 (1964). Of all the considerations that a public official must contend with, the consideration dealing with national origin and/or racial discrimination has consistently been separated from the others, and this court has held that an equal protection violation on national origin and/or racial grounds lies in the intent or motive to discriminate. *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 97 S.Ct. 555 (1977).

The standard adopted by *Wood,* supra, is that a public official is not immune from liability for damages under Section 1983 if he knew or reasonably should have known, that the action he took within his sphere of official responsibility would violate the constitutional right of Respondents, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to Respondents.

The Ninth Circuit's decision clearly and properly sets forth the standard to be used when the constitutional right which is violated in the denial of equal protection on the basis of national origin and/or racial prejudice. Respondents must prove that an official violated a clearly established constitutional right or Respondents must prove dis-

criminatory intent. Either proof is the proof that negates the existence of a qualified immunity. If Respondents prove either of the two prongs required, no immunity exists. If Respondents are not able to prove either, no immunity is required.

Petitioners claim that the judgment below will be enforced against them personally and "Deprivation of the official's personal estate without the application of proper law limiting his liability has this effect."[10] Under California law,[11] Petitioners herein are entitled to indemnity from the City of Calistoga for the payment of this judgment. Further, the City of Calistoga, has an insurance policy in effect, which will pay for this verdict. Attorneys for Petitioners, are the attorneys hired by the insurance company and all their fees and expenses have been paid, and will continue to be paid by said insurance company. Neither the treasury of the City of Calistoga, or the personal estate of any Petitioner, will be depleted by anything done by this court, or the courts below. However, upholding of the judgments below will have the effect of making it known to the people of Calistoga and the surrounding area, that their elected and public officials discriminated against citizens of this Country because of their race or national origin, and that the Supreme Court of the United States has rejected their frivolous defenses and arguments.

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[10]Petitioners' Petition, p. 10, first paragraph, last sentence.

[11]California Government Code Section 825.

III

DUE PROCESS WAS NEVER IN ISSUE AT THE TRIAL COURT OR THE APPELLATE COURT

Whether Respondents received due process during the period herein involved has never been an issue in this litigation.

Respondents did not claim a deprivation of Due Process in their pleadings. Neither Respondents or Petitioners presented any evidence on the issue of due process, nor were jury instructions requested or given on the issue. A Due Process issue was never presented to the United States Court of Appeals for the Ninth Circuit for its consideration or review. The Circuit Court did not address itself to this issue in any manner whatsoever.[12]

The Due Process issue is presented for the first time to this court in Petitioners' PETITION FOR A WRIT OF CERTIORARI. The policy of this court is not to consider issues which have not been presented to the court below. *United States v. Lovasco,* 431 U.S. 783, 97 S.Ct. 2044 (1977); *Neely v. Martin K. Eby Construction,* 386 U.S. 317, 87 S.Ct. 1072 (1967); *Silber v. United States,* 370 U.S. 717, 82 S.Ct. 1287 (1962).

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[12]Most of Petitioners' questions on appeal to the Circuit Court, were standard questions raised in Motions for New Trial and were as follows: 1. Judgment notwithstanding the verdict was erroneously denied; 2. Appellants' motion for new trial was erroneously denied by the Trial Court; 3. The verdict was against the weight of the evidence presented at trial; 4. The Trial Court's refusal to grant a new trial or remittitur based upon excessive damages was prejudicial error; 5. Qualified immunity is available as a defense in actions brought under 42 USC Section 1983 involving public officials acting in good faith in the discharge of official duties.

The Due Process question presented to this court is another example of Petitioners' continued misstatement of the issues and facts as they actually arose in the courts below and should not be considered by this Honorable Court.

CONCLUSION

Petitioners' request for a Writ of Certiorari, simply stated, is: They drafted and presented a Good Faith instruction at trial. The trial court refused to give the instruction as written and gave its own Good Faith instruction. The jury found against petitioners, and so did the Circuit Court. Therefore, grant the Petition.

Petitioners do not acknowledge to this court that a Good Faith instruction was given. On the contrary, Petitioners represent to this court that the trial court refused to give any instruction to the jury on Good Faith.

Petitioners' Due Process question raises a new issue with the hope this court will hear it. A Due Process issue was never raised, at any stage in these proceedings, by either Petitioners or Respondents.

The filing of their Petition, is but one more example of Petitioners' continued efforts to hinder, delay and cause more financial expenses to Respondents in obtaining their remedy.

Respondents respectfully submit that Petitioners' petition is without merit and frivolous; therefore, should be denied.

Respondents hereby request damages from Petitioners pursuant to Rule 49.2 of this Honorable Court.

Respectfully submitted,

ROBERT E. GONZALES
LOUIS F. FLORES
STUART E. PATT
COUNSEL OF RECORD
GONZALES & FLORES
Counsel for Respondents

(Appendices follow)

Appendix A

INVESTIGATION AND REPORT ON APPLICATION FOR LICENSE UNDER ALCOHOLIC BEVERAGE CONTROL ACT—DECEMBER 12, 1974

1. Division Northern 2. District or Branch Santa Rosa

3. Date 12-9-74

4. Name of Applicant Flores, Alma & Barbaro 532-36-1653/567-50-1480

5. DBA Palacio

6. Address of Premises 1400 Lincoln Ave., Calistoga 94515 2801
(Zip Code) (Geographical Code)

7. Mail Address (If Different) 506 Silverado Trail, St. Helena 94574 perm.
(Zip Code) (Temp. or Perm.)

8. Licenses Applied for 41 9. Temporary License Issued no
(Yes or No)

10. Type of Transaction original
(If intercounty transfer, show transferor's county)

11. License Already Held 12. Eff. Date/Est. Compl. Date issuance

13. Copies Mailed *8-30-74 14. Pub. Date/Name 9-5-74
(Date)
Weekly Calistogan

15. Date Premises Posted 9-5-74 16. Date Inspected 9-5-74

17. Where Posted On front door, 6' high, dated 9-5-74.

18. Transferred From

License No.

19. Pending Disciplinary Action Against Transferor
(Use Red Type)

20. Transferor's License Originally Issued After June 1, 1961 (Yes or No)

(If Yes, enter date)

21. Former Licensee at These Premises Ottenello, Edward A., Mary & Ottoa tfr to other person & premises 5-15-73

22. License No. 48-29107 ABC-231 Att.

(Yes or No)

ABC-226 Att.

(Yes or No)

23. Renewal Fee Paid: Date Rec. No.
Amount

24. Mail License to District Office (Yes or No) no

25. Hearing Time 4 hrs.

26. Remarks Supplemental application—late publication. Protests have been received from James Autry, COP, Calistoga, and City of Calistoga

27. Moral Character:

Applicants have been husband and wife since 10-28-62.

Alma Flores, born 1-1-44, age 30. First application for a license. Employment record on 208. CII and 208 show no arrests.

Barbaro Flores, born 12-4-39, age 34.

Lic. History: 40 lic. 2-9-71 to date w/partner and alone at 6512 Washington St., Yountville; no record of any discp. action.

Arrest:

April, 1974 Fairfield Having a loaded gun within city limits fine $12. See report of protest for further permits or prior operations.

28. Premises: Mexican Restaurant & Bar

Premises is located in the heart of the business district in the City of Calistoga. Premises is on the ground floor of a two-story stucco and wood building. Premises will have a bar seating 10 persons. The dining room will seat approx. 50 persons. The kitchen has a U.S. gas range; 4 burners and 12-inch griddle (commercial type); commercial refrigerator; 3-compartment sink, dishes, forks, pots, pans, etc. Complies with Sec. 23038 and local health regulations and Sec. 23790.

Hours of Operation; 11 am to 11 pm, 7 days a week.

Mexican-type food to be served 7 days a week.

Lic. History: 48 lic. 12-39 to 5-15-73.

See report on protest for further details on premises.

29. Financing: Total consideration is $9,909.

They have revised the financing of this venture.

$4,400 in the Bank of America, St. Helena, is to be used for new equipment purchased and for fees, etc. Account in this bank, second book shows 12-10-70.

5,509 to come from business and from his pay as needed.

$9,909

Control of Premises:

Lessor: Dunya Chernenko Zaitzeff

Lessee: applicants

Terms: $400 per month; expires 8-14-77. Copy of lease in file.

30. If Recommendation Is Denial, Use Red Type

Denial:

Recommendation Anthony B. Scurachio 12/12/74
(Investigator) (Date)
E. J. Spitzley 12-12-74
(Supervisor) (Date)

Denial:

Recommendation Stanley J. Pierce 12-12-74
(District Administrator) (Date)

For Division Review yes
(Yes or No)

Recommendation Denial B. M. Grant 12-13-74
(Assistant Director) (Date)

Review J. Whitfield 12-18-74

Denial

Issuance of the above license would be contrary to public welfare and morals within the meaning and intent of Article XX, Sec. 22, of the Constitution of the State of California, Sec. 23001 and 23958 of the Alcoholic Beverage Control Act, in that there are sufficient licenses located in the City of Calistoga to satisfy the public demand of those persons who normally patronize the area. Therefore, the issuance of the above-described license would result in an undue concentration of licenses within the City of Calistoga and would aggravate an existing policing problem.

Reasons for Denial

1. Protests have been filed by the City of Calistoga and the Chief of Police of Calistoga, alleging that there is a concentration of licenses in the City of Calistoga and the issuance of this license would create a law-enforcement problem.

2. At the present time the City of Calistoga has a population of 2,200 and ABC Dept. records show that the following licenses have been issued in the City of Calistoga:

4—On Sale General Eating Place licenses
2—On Sale General Public Premises licenses
5—On Sale Beer & Wine Eating Place licenses
2—On Sale Beer licenses
3—Off Sale General licenses
1—Off Sale Beer & Wine license
17—Total number of licenses issued

3. The Calistoga Police Dept. has only seven full-time police officers and four reserve police officers to provide a 24-hour-a-day, 7-days-a-week coverage for the citizens of

the City of Calistoga. It has been the experience of the Chief of Police of Calistoga that establishments selling alcoholic beverages require additional police services; therefore, the the issuance of the license would aggravate an existing police problem

Report of Investigation of Protest & Denial

Summary of Report: On 8-30-74 an application was filed by the applicants for a new On Sale Beer & Wine Eating Place license for a premises located at 1400 Lincoln Ave., Calistoga. One of the applicants, Barbaro Flores, is currently licensed with a type 40 license at 6512 Washington St., Yountville, DBA Mexicali Rose. Protests were filed by the City of Calistoga and the Chief of Police of Calistoga, alleging that the applicant's licensed premises in Yountville was operated in a disorderly manner and that the issuance of a license to the applicant in the City of Calistoga would result in a concentration of licenses, and that there were already sufficient licenses to serve the needs of the public.

Investigation of protests does establish that there appears to be sufficient licenses to satisfy the public demand for alcoholic beverages and that the issuance of any additional licenses would result in a concentration of licenses and would aggravate an existing law-enforcement problem.

List of Licensed Premises in Calistoga

1. James J. & Rosemarie R. Johnson dba: Surfwood 1410 Lincoln Ave., Calistoga	Lic. 48-26659 On Sale General Public Premises
2. Betty E. & Burrell C. Coil dba: Susie's 1436 Lincoln Ave., Calistoga	Lic. 48-32023 On Sale General Public Premises
3. Charles H. & Herbert R. Hanly dba: Hanly's Smoke Shop 1430 Lincoln Ave., Calistoga	Lic. 21-22869 Off Sale General

4.	Maha & Tarek Baroody dba: Bianco's 1440 Lincoln Ave., Calistoga	Lic. 41-20723 On Sale Beer & Wine Eating Place
5.	Lois G. & Stanley Mentink dba: Royal Inn 1880 Lincoln Ave., Calistoga	Lic. 47- On Sale General Eating Place
6.	Gregory Lyons dba: Les Pyrenees 2082 Lake County Hwy., Calistoga	Lic. 41-03377 On Sale Beer & Wine Eating Place
7.	Alice L. & Joseph O. Guerrera dba: The Colonial 1368-74 Lincoln Ave., Calistoga	Lic. 47-15330 On Sale General Eating Place
8.	George R. Browman & Gerard J. Gagnon dba: Calistoga Inn 1250 Lincoln Ave., Calistoga	Lic. 47-06770 On Sale General Eating Place
9.	Paul C. & Susan E. Manfredi dba: The Citadel 1009 Foothill Blvd., Calistoga	Lic. 41-64895 On Sale Beer & Wine Eating Place
10.	Harold B. Reeder dba: Reeder's 1237 Lincoln Ave., Calistoga	Lic. 40-45623 On Sale Beer
11.	Carmen D. & Gregorio Hernandez dba: El Faro 1353 Lincoln Ave., Calistoga	Lic. 41-28042 On Sale Beer & Wine Eating Place
12.	Merle E. & Peter D. Holtzen dba: Pete's Delicatessen 1359 Lincoln Ave., Calistoga	Lic. 20-67366 Off Sale Beer & Wine
13.	Patricia & Shefki Citaku dba: Alex's Fine Food 1437 Lincoln Ave., Calistoga	Lic. 47-26611 On Sale General Eating Place
14.	Maha & Tarek Baroody dba: Mt. View Coffee Shop 1457 Lincoln Ave., Calistoga	Lic. 41-47095 On Sale Beer & Wine Eating Place
15. & 16.	Bess Ghisolfo dba: Johnny's Place 1463 Lincoln Ave., Calistoga	Lic. 21-24542 Off Sale General Lic. 48-24542 On Sale General Public Premises
17.	Napa County Fair Association dba: Napa County Fair 1435 Oak St., Calistoga	Lic. 40-15908 On Sale Beer
18.	Fairway & 2d	

Appendix B

CALIFORNIA BUSINESS AND PROFESSIONS CODE § 24013

Protests

Protests may be filed at any office of the department at any time within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at such premises.

The department may reject protests, except protests made by a public agency or public official or protests made by the governing body of a city or county, if it determines such protests are false, vexatious, or without reasonable or probable cause at any time before hearing thereon, notwithstanding the provisions of Section 24016 or 14300. If the department rejects a protest as provided in this section and issues a license, a protestant whose protest has been rejected may, within 10 days after the issuance of the license, file an accusation with the department alleging the grounds of protest as a cause for revocation of the license and the department shall hold a hearing as provided in Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

Nothing in this section shall be construed as prohibiting or restricting any right which the individual making the protest might have to a judicial proceeding.

Appendix C

Good Faith

During trial, evidence has been received concerning the policies, practices, and procedures of the California Department of Alcoholic Beverage Control, and you have been instructed concerning the varous aspects of California Law.

If you find that any of the defendants acted in a reasonable good faith reliance on those procedures on laws with a reasonable good faith belief that their actions did not violate plaintiffs' constitutional rights, you should return a verdict in favor of that defendant. This belief must be reasonable in light of the circumstances at the time of the action. However, if any defendant acted on the basis of a purpose, motive or intent to discriminate against the plaintiffs because they are of Mexican descent, or if any defendant knew or reasonably should have known that the actions he took violated plaintiffs' rights to the equal protection of the laws as defined in these instructions, then the defendant's actions cannot be considered to be taken in good faith and you should return a verdict in favor of the plaintiffs and against the defendant.

Wood v. Strickland, 420 U.S. 308 (1975)

Scheuer v. Rhodes, 410 U.S. 232 (1974)